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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1298

**ESTATE OF ADA M. WILKINSON, CENTRAL HANOVER
BANK & TRUST COMPANY, EXECUTOR, PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 35-42) is reported at 5 T. C. 1246. The opinion of the Circuit Court of Appeals (R. 57-60) is reported at 159 F. 2d 167.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 29, 1947 (R. 61). The petition for a writ of certiorari was filed on April 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

As executrix of the prior decedent's estate, the decedent distributed to herself, as residuary legatee, all of the remaining assets of the prior estate, and thereafter paid the obligations of the prior estate. Does Section 812 (c) of the Internal Revenue Code exclude from the computation of the deduction for property previously taxed, that portion of the assets of the prior estate representing unpaid liabilities existing at the time of the distribution because not received by this decedent by "gift, bequest, devise, or inheritance?"

STATUTE INVOLVED

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(c) *Property Previously Taxed.*—An amount equal to the value of any property (A) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, * * * where such property can be identified as having been received by the decedent * * * from such prior decedent by gift, bequest,

devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. This deduction shall be allowed only where * * * an estate tax imposed under this subchapter, the Revenue Act of 1926, 44 Stat. 69, or any prior Act of Congress, was finally determined and paid by or on behalf of * * * the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this paragraph in respect of the property or property given in exchange therefor.

Where a deduction was allowed of any mortgage or other lien in determining the * * * estate tax of the prior decedent, which was paid in whole or in part prior to the decedent's death, then the deduction allowable under this paragraph shall be reduced by the amount so paid. The deduction allowable under this subsection shall be reduced by an amount which bears the same ratio to the amounts allowed as deductions under subsections (a), (b) and (d) as the amount otherwise deductible under this subsection bears to the value of the

decedent's gross estate. Where the property referred to in this subsection consists of two or more items the aggregate value of such items shall be used for the purpose of computing the deduction.

* * * * *

(26 U. S. C. 1940 ed., Sec. 812.)

STATEMENT

The facts as stipulated and found by the Tax Court may be summarized as follows:

Horace S. Wilkinson, the decedent's husband (hereinafter called the "prior decedent") died on April 11, 1937, leaving his wife, the present decedent, as executrix and sole legatee. She died on March 5, 1941, within five years from the death of the prior decedent. (R. 36.)

The decedent exercised the privilege granted her as executrix to suspend for one year the appraisal of the first decedent's estate¹ which was finally appraised at \$3,421,672.83. Deductions amounting to \$411,039.73 were allowed to fix the net estate but there were other charges for the most part federal estate and state succession taxes and federal income taxes, which were not deductible amounting to \$965,231.64. The net value of the assets coming to the wife was therefore \$2,045,401.46. The administration of the estate being suspended on October 21, 1937, the probate court on the wife's application directed her to distrib-

¹ Section 811 (j), Internal Revenue Code.

ute "to herself as sole legatee" personal property (shares of stock) which had an appraised value of \$2,931,766.03. In 1938 she distributed to herself the other personal property of the estate appraised at \$44,266.09. (R. 36-38.)

At the time of these distributions the prior decedent's estate was still indebted in the amount of \$1,080,961.77, which the decedent paid before she died. Certain of the assets have been identified in the present decedent's estate as having been included in the prior decedent's estate: (1) securities of the value of \$2,341,421.90 (the appraised value for the husband's estate); (2) the proceeds of life insurance policies amounting to \$135,119.77; (3) real estate of the value of \$1,090. (R. 39.)

Decedent's executor claimed deductions of \$2,477,631.67 for property taxed within five years. The figure was the sum of the three items mentioned above. The Commissioner reduced this figure to \$1,627,174.47. He allowed in full the proceeds of the insurance policies and the value of the real estate. The remaining item, \$1,490,964.70 in personal property, he arrived at by computing the ratio that the unpaid debts of \$1,080,961.77 bore to the shares of stock distributed to the wife, \$2,976,032.12. The Commissioner spread the debts over all the assets "distributed" and concluded that the wife "received" by "bequest" 63.677752 percent of the distributed personal property. (R. 39.)

The Tax Court in a reviewed decision upheld the Commissioner's determination (R. 42) and the Circuit Court of Appeals for the Second Circuit affirmed (R. 60).

ARGUMENT

The decision below, contrary to the estate's contention (Pet. 7), is not in conflict with *Commissioner v. Garland*, 136 F. 2d 82 (C. C. A. 1). In that case it was held that the deduction for property previously taxed² should not be reduced by the amount by which obligations of the prior estate were paid out of that estate's capital gains and income before distribution. It was there conceded that the deduction for property previously taxed should be reduced by an amount equal to obligations of the prior estate unpaid at the second decedent's death. That is in essence the precise question in this case because there is no ground for distinction, and petitioner suggests none, between the conceded issue in the *Garland* case and the question here. That question is whether the deduction for property previously taxed should be reduced by the amount of the obligations of the first estate paid by the second decedent.

² That case arose under Section 303 (a) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 806 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Section 402 of the Revenue Act of 1934, c. 277, 48 Stat. 680, which is in all material respects identical with Section 812 (c) of the Internal Revenue Code, *supra*, with which we are here concerned.

On the basis of Section 812 (c), the court below ruled that to the extent that the decedent paid the obligation of the prior estate she acquired the creditors' interests in the prior estate by purchase and not by "bequest, devise, or inheritance" (R. 58-59). While the Government urged that the statute required a like result in the *Garland* case, there the court concluded that insofar as obligations of the prior estate were paid out of capital gains and income accruing during administration and the property was thus received unencumbered by indebtedness, that property was received by bequest or inheritance. The difficulty of pointing to any substantial grounds of distinction between the two situations caused the court below to remark that the *Garland* decision is in "principle * * * to the contrary" (R. 59), but that the First Circuit had thought that there was a distinction and had reserved the question presented by the case at bar (R. 60).

The *Garland* opinion expressly refutes any contention that the court intended the rule there announced to be applicable to facts such as are presented by the instant case. In answering the Commissioner's contention that the estate's concession of the issue similar to the one here was inconsistent with the latter's position on the contested issue, the court stated (p. 84), "We do not perceive the inconsistency." The reason it gave was that (p. 84):

It may be that when the present decedent took over as her own the specific real estate and securities from the prior estate, with \$14,031.50 of debts of the prior estate unprovided for, to that extent the property was not properly "received" by the present decedent within the meaning of § 303 (a) (2). Be that as it may, we are not now required to pass on the propriety of the concession.

And the *Garland* opinion quoted with approval from that portion of the Fifth Circuit's opinion in *Bahr v. Commissioner*, 119 F. 2d 371, certiorari denied, 314 U. S. 650, which stated that to the extent that debts of the prior estate remained unpaid, the second decedent did not receive property by devise. The *Bahr* case squarely supports the decision below. In addition the court in the *Garland* case emphasized that the estate distinguished the *Garland* situation from a situation such as this on that basis (136 F. 2d at 84-85).

Whether, as the Tax Court suggested in the instant case (R. 42), the inference to be drawn from the opinion in the *Garland* case is that the First Circuit would have reached the same conclusion as the court below on the specific issue here presented is open to question. Certainly the opinion indicates that the court would not have regarded such a result as inconsistent. Since it seems highly unlikely that a review of the case at bar would result in a ruling on the factual situation presented by the *Garland*

case, a decision by this Court would not serve to resolve any conflict between circuits. Therefore, although we regard the *Garland* decision as unsound, we do not believe that granting of the writ is justified in this case.

We think there is no question that this case has been correctly decided. The obvious purpose of the statute was to prevent gift or estate taxation of the same property twice within a five-year period. The portion of the property received by the decedent equal to debts deductible in the prior estate were not subject to the prior estate tax. To allow a deduction for property previously taxed which includes an amount equal to such obligations would immunize that amount of the property from all estate taxation which it is plain was not intended. To the extent that the property represented such nondeductible items as federal and state estate taxes, the allowance of a deduction for property previously taxed would be to permit indirectly a deduction which Congress has expressly prohibited. And as the court below pointed out, the allowance of the deduction sought here would provide an incentive for legatees to take over assets of an estate and pay the debts themselves. This would result in a fruitful source of tax avoidance.

Nor is there a "probable" conflict (Pet. 7) with the decision of this Court dated April 14, 1947, in *Crane v. Commissioner*, which dealt with the different language of a totally unrelated section of

the income tax statute. The question there was the basis of property acquired by devise for the purpose of computing gain on its sale. The Court held that as used in Section 113 (a) (5) of the Revenue Act of 1938, c. 289, 52 Stat. 447, the word "property" meant the physical property itself or the owner's legal right in it, and not merely his equity. This conclusion was ~~perfected~~ fortified by administrative construction and statutory purpose. Here, as we have seen, the emphasis was on the phrase "received * * * by bequest." In any event the statutory purpose here requires a different interpretation of "property." Cf. footnote 25 of this Court's opinion in the *Crane* case.

CONCLUSION

The case was correctly decided and is not in conflict with the rule in any other circuit. Therefore, the petition should be denied.

Respectfully submitted,

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Acting Solicitor General.
 SEWALL KEY,
Acting Assistant Attorney General.
 LEE A. JACKSON,
 IRVING I. AXELRAD,
Special Assistants to the Attorney General.

MAY, 1947.

³ It is perhaps significant that Judge Learned Hand, who wrote the decision below as well as that affirmed in the *Crane* case, perceived no inconsistency.